

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRENTON DWAYNE THOMPSON,
#93866

Plaintiff,

vs.

HOWARD SKOLNIK, *et al.*,

Defendants.

2:10-cv-01326-GMN-LRL

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. On November 30, 2010, this court dismissed plaintiff's complaint with leave to amend his Fourteenth Amendment due process claims (docket #7). The court now reviews the amended complaint (docket #9).

I. Screening Standard

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is

1 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
 2 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
 3 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
 4 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
 5 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
 6 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
 7 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
 8 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,
 9 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
 10 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
 11 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

12 Allegations in a *pro se* complaint are held to less stringent standards than formal
 13 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.
 14 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
 15 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the
 16 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal
 17 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of
 18 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
 19 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*
 20 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). Moreover, “a finding of factual frivolousness is appropriate
 21 when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are
 22 judicially noticeable facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).
 23 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
 24 complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint
 25 that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106
 26 (9th Cir. 1995).

1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
 2 complained of was committed by a person acting under color of state law; and (2) that the conduct
 3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,
 4 689 (9th Cir. 2006).

5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at High Desert State Prison (“HDSP”), has sued Nevada
 7 Department of Corrections (“NDOC”) Director Howard Skolnik, Deputy Director Greg Cox, Southern
 8 Desert Correctional Center (“SDCC”) Associate Warden of Programs (“AWO”) Cheryl Burson, and Sgt.
 9 Daniel Angus. In his amended complaint, plaintiff alleges violations of his Fourteenth Amendment Due
 10 Process rights related to disciplinary proceedings.

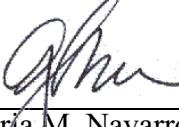
11 When a prisoner faces disciplinary charges, in order to comport with Fourteenth
 12 Amendment due process rights prison officials must provide the prisoner with (1) a written statement
 13 at least twenty-four hours before the disciplinary hearing that includes the charges, a description of the
 14 evidence against the prisoner, and an explanation for the disciplinary action taken; (2) an opportunity
 15 to present documentary evidence and call witnesses, unless calling witnesses would interfere with
 16 institutional security; and (3) legal assistance where the charges are complex or the inmate is illiterate.
 17 *See id.* at 563-70; *see also Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985);
 18 *Serrano v. Francis*, 345 F.3d 1071, 1077-78 (9th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th
 19 Cir. 1997); *Walker v. Sumner*, 14 F.3d 1415, 1419-20 (9th Cir. 1994), *abrogated in part on other grounds*
 20 by *Sandin v. Connor*, 515 U.S. 472 (1995); *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986),
 21 *abrogated in part on other grounds by Sandin*, 515 U.S. 472. While plaintiff sets forth some of the
 22 charges against him from portions of the Notice of Charges he received, and describes which defendants
 23 were involved in which portions of the disciplinary proceedings, he again fails to set forth any
 24 allegations whatsoever about how the disciplinary proceedings violated his due process rights.
 25 Accordingly, plaintiff’s amended complaint is dismissed for failure to state a claim for which relief may
 26 be granted.

1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that plaintiff's amended complaint (docket #9) is
3 **DISMISSED** without prejudice.

4 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and close
5 this case.

6 DATED this 29th day of December, 2010.

7
8 
9
10 Gloria M. Navarro
11 United States District Judge

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26